

Transcript

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

DOCKET FILE COPY ORIGINAL

NFL ENTERPRISES LLC,

Complainant,

v.

MB Docket
No. 08-214

COMCAST CABLE
COMMUNICATIONS, LLC,

File No.

CSR-7876-P

Defendant.

Volume 8

The Federal Communications Commission
Hearing Room TW-A363
445 12th Street, SW
Washington, D.C. 20554

Friday, April 17, 2009

9:30 a.m.

BEFORE:

RICHARD L. SIPPEL,
Chief Administrative Law Judge

Redacted Copy

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T-A-B-L-E O-F C-O-N-T-E-N-T-S

WITNESS DIRECT CROSS REDIRECT RECROSS

Larry Gerbrant

By Mr. Toscano 1772
 By Mr. Schmidt 1792

Jeff Shell

By Mr. Perez-Marques 1866
 By Mr. Schmidt 1886

Madison Bond

By Mr. Perez-Marques 1934 1994
 By Mr. Phillips 1944 2000
 By Mr. Mumaw 1991
 By Mr. Schoman 1993 2003

Brian Roberts

By Mr. Carroll 2006
 By Mr. Phillips 2058

Exhibit No.

Mark Recd

Enterprises

205 email from Gold 1927

223 Press Release 2096 2096

230 Bridgen Depo 2109

231 Chandler Depo 2109

232 Cohen Depo 2109

Comcast

721 Notes RE Conversation between 2047 2047

Roberts and Goodell

1 P-R-O-C-E-E-D-I-N-G-S

2 (9:36 a.m.)

3 JUDGE SIPPEL: All right. Let's
4 go on the record.

5 Good morning. This is the last
6 day of NFL versus Comcast, "last day" in the
7 sense of the last day that we will be in
8 court. There is two reasons for that. First,
9 there is consent that you are going to be
10 finished with your case today. That has been
11 the scheduling. And, secondly, there is going
12 to be another party, there is going to be
13 another case starting on Monday, so there is
14 not going to be any room in here. So we have
15 to do something today to wrap this up.

16 That is all I have to say.
17 Anybody have anything more they want to add
18 right now? Comcast, do you have a witness?

19 MR. CARROLL: Good morning, Your
20 Honor, we do. My colleague, Mr. Toscano, is
21 going to present the next witness.

22 JUDGE SIPPEL: Sir?

1 MR. TOSCANO: Our first witness
2 today is Larry Gerbrant.

3 JUDGE SIPPEL: Mr. Gerbrant? Do
4 you have the spelling of that name, Mr.
5 Reporter? You do?

6 WHEREUPON,

7 LARRY GERBRANT
8 was called as a witness by Counsel for Comcast
9 Cable Communications, LLC, and having been
10 first duly sworn, assumed the witness stand,
11 was examined and testified as follows:

12 JUDGE SIPPEL: Please be seated.
13 Do you have a water supply? And today we have
14 glasses; that is, drinking glasses, our best
15 crystal. There we go.

16 (Laughter.)

17 MR. TOSCANO: Your Honor, may I
18 approach to present the witness --

19 JUDGE SIPPEL: Yes, you may, sir.

20 MR. TOSCANO: -- his --

21 JUDGE SIPPEL: Yes, you may.

22 MR. TOSCANO: -- direct written

1 testimony? And I have copies --

2 JUDGE SIPPEL: Thank you.

3 MR. TOSCANO: -- for you.

4 JUDGE SIPPEL: This has been pre-
5 marked Comcast Exhibit 40.

6 MR. TOSCANO: And it is actually
7 in evidence already.

8 JUDGE SIPPEL: It is in evidence
9 already.

10 MR. TOSCANO: It is.

11 JUDGE SIPPEL: Thank you.

12 MR. TOSCANO: Thank you.

13 JUDGE SIPPEL: And that is what --
14 we will refer to it as Exhibit 40 to save
15 time. This is -- you read and signed this,
16 Mr. Gerbrant?

17 THE WITNESS: I have.

18 JUDGE SIPPEL: Am I pronouncing
19 your name right, because --

20 THE WITNESS: Gerbrant works just
21 fine.

22 JUDGE SIPPEL: Once I get started,

1 it is hard for me to stop.

2 All right. Let's go.

3 DIRECT EXAMINATION

4 BY MR. TOSCANO:

5 Q Good morning, Mr. Gerbrant. Where
6 are you currently employed?

7 A I am principal at Media Valuation
8 Partners.

9 Q And what does Media Valuation
10 Partners do?

11 A We do consulting advisory
12 services, custom research, valuation, and
13 litigation support.

14 Q Have you ever worked for a cable
15 company?

16 A I have. From 1982 to '84, I was
17 Operations Manager for Orion Cable Systems in
18 Denver, Colorado.

19 Q And do you have any experience
20 analyzing the cable industry?

21 A I have been an industry analyst
22 for 25 years.

1 Q Okay.

2 A Including 20 years at a company
3 called Paul Kagan Associates.

4 Q And what is Kagan?

5 A Kagan -- it is now called S&L
6 Kagan, and it is considered the leading media
7 research firm, independent media research
8 firm, following the cable broadcasting and
9 motion picture industries.

10 Q And what did you do at Kagan?

11 A I was Senior Analyst and Chief
12 Operating Officer at the time the company was
13 sold.

14 Q Did you write anything concerning
15 the cable industry when you were at Kagan?

16 A Actually, my -- one of the very
17 first newsletters that I started writing when
18 I joined the company in 1984 was Cable TV
19 Advertising. But over the span of the 20
20 years I wrote for more than 20 different
21 newsletters, all either covering the cable
22 programming business, the cable network

1 business, television programming, television
2 syndication, as well as maintaining --
3 creating and maintaining the Kagan economics
4 of basic cable networks database.

5 Q And do you have any experience
6 working with ratings data?

7 A I have worked with ratings data
8 virtually my entire career, and actually was
9 Senior Vice President and General Manager of
10 the Nielsen Analytics Division from 2005 to
11 2007.

12 Q And what did you do at Nielsen?

13 A The Analytics Division was
14 specifically tasked with looking at the
15 evolving business models for television
16 programming, especially in light of consumer
17 adoption of new technologies, such as
18 broadband, video on demand, mobile handsets.
19 So all of the new legs of the video delivery
20 to consumers.

21 Q And what did that involve?

22 A It involved accessing a large

1 number of the Nielsen databases, looking at --
2 part of that involved looking at some ratings,
3 advertising information, ad models, as well as
4 combining that with primary consumer research.

5 Q And have you ever testified as an
6 expert witness before?

7 A I have been an expert witness in
8 over 50 different cases.

9 Q And on what kinds of topics?

10 A Mostly in the television
11 programming, cable programming, cable industry
12 -- quite a few TV library, motion picture
13 library valuation cases, industry standards
14 and practices, and media advertising in the
15 entertainment industry.

16 Q And you have submitted direct
17 written testimony in this case, correct?

18 A I have.

19 Q And that is -- your testimony is
20 before you as Exhibit 40?

21 A That is correct.

22 Q What is your principal opinion in

1 this case?

2 A That the price for the NFL Network
3 was excessive, and that there were sound
4 business reasons for placing the NFL Network
5 on a tier.

6 Q And how did you conclude that the
7 NFL Network's price was excessive?

8 A Well, first of all, it is the
9 [REDACTED] cable
10 network out there. What I did was I looked at
11 a series of factors that made the price
12 excessive.

13 Q And what were those factors?

14 JUDGE SIPPEL: Just a minute.

15 Before we get there -- I am sorry, sir. I
16 really didn't mean to interrupt you. But you
17 are tendering him as an expert?

18 MR. TOSCANO: Yes, we are.

19 JUDGE SIPPEL: Is there any
20 objection to that?

21 MR. SCHMIDT: We do dispute that
22 Mr. Gerbrant has a basis for giving his expert

1 opinion.

2 JUDGE SIPPEL: Well, we will --

3 MR. SCHMIDT: But we think he
4 should come in now, subject to us arguing that
5 in post-trial briefing.

6 JUDGE SIPPEL: All right. Well,
7 he is presumptively testifying as an expert,
8 and we will make a firm determination. You
9 can make an appropriate motion if you feel up
10 to it, but --

11 MR. SCHMIDT: That seems like the
12 right approach, Your Honor.

13 JUDGE SIPPEL: -- if you feel it
14 necessary.

15 Do you understand that, sir?

16 THE WITNESS: I do.

17 JUDGE SIPPEL: Okay. I am sure
18 that -- anyway, fine, I am not worried about
19 it.

20 MR. TOSCANO: Thank you.

21 JUDGE SIPPEL: Okay. Let's go
22 forward.

1 BY MR. TOSCANO:

2 Q Mr. Gerbrant, I had asked you --

3 JUDGE SIPPEL: Oh, one other
4 question. I'm sorry. I'm sorry. Is this
5 testimony of Mr. Gerbrant, is this
6 confidential? Is there anything in here that
7 is confidential?

8 MR. TOSCANO: There is some
9 confidential material in the direct written
10 testimony. We don't intend to get into that
11 in the oral direct.

12 JUDGE SIPPEL: All right. Is it
13 in the charts in the back, or is it actually
14 in the text?

15 MR. TOSCANO: It is in both, but
16 it is mostly in the charts.

17 JUDGE SIPPEL: Okay. Because I
18 want to get a copy out on the press table as
19 soon as you can. Okay. Go ahead. That is
20 not a directive; that is just an observation
21 right now.

22 BY MR. TOSCANO:

1 Q Again, I asked you, what were the
2 factors that led you to the conclusion that
3 the NFL Network's price was excessive?

4 A There was limited exclusive
5 content on the channel. There was limited
6 unique content on the channel. There was a
7 lack of live game coverage. The network did
8 not target an underserved demographic, and the
9 network was highly seasonal, or the core
10 programming of the network was highly seasonal
11 in its nature.

12 Q And you testified about the price
13 of the NFL Network in comparison to other
14 networks. How did you do that comparison?

15 A I actually looked at Kagan data
16 for over 70 different cable networks, and it
17 turned out to be the [REDACTED] highest out of over
18 70 cable networks.

19 Q And in doing that comparison, did
20 you consider FSN?

21 A I believe you are referring to Fox
22 SportsNet.

1 Q And that is Fox SportsNet, not Fox
2 Sports News, as Mr. Schmidt was referring to
3 it yesterday?

4 A That is correct.

5 Q And why didn't you look at that?

6 A Well, first of all, it is no
7 longer an operating entity. And, secondly, it
8 is actually not a national network per se. It
9 is a collection of regional sports networks.

10 Q I would like to go back through
11 each of the factors that you mentioned in
12 concluding that the NFL Network's price is
13 excessive. And, first, you testified that the
14 NFL Network has limited exclusive content.
15 What do you mean by that?

16 A Well, first of all, NFL football
17 games are widely available for free for anyone
18 who puts up a pair of rabbit ears on virtually
19 any Sunday in the fall. Secondly, you can get
20 these games for free, the same package of
21 eight NFL games for free, if you are a Verizon
22 broadband customer, and you can get them for

1 free if you are -- on your mobile phone if you
2 are a Sprint customer.

3 Q How does the NFL Network's lack of
4 exclusivity affect its value to cable
5 operators like Comcast?

6 A This lack of exclusivity means
7 that it is -- it severely undercuts the case
8 for creating price.

9 Q And you also testified that the
10 NFL Network has limited unique content. What
11 did you mean by that?

12 A First of all, as I mentioned, the
13 NFL content is widely available on many
14 different channels, many different stations.
15 There is simply no lack of NFL game and NFL-
16 associated content.

17 The NFL films archives, from which
18 the NFL Network draws, have already been
19 licensed, been licensed heavily for years, and
20 that programming drawn from that archive
21 appears on numerous other networks, including
22 ESPN and Showtime.

1 There are literally dozens of
2 local broadcast stations that carry NFL-
3 related shows put on by the teams, by the
4 coaches, sometimes even the players. So there
5 is an abundance of NFL content, and very
6 little of that is -- there is very little
7 unique content ultimately on the NFL Network.
8 I think Paul Tagliabue described it as, aside
9 from the eight games most of the content was
10 ancillary.

11 Q What do you mean when you say that
12 there is a lack of live game coverage on the
13 NFL Network?

14 A Well, there was -- first of all,
15 the eight games represent 15 hundredths of one
16 percent of all of the programming that is on
17 the NFL Network. And even if you expand that
18 definition, say, okay, we are going to look at
19 all of the live game content on the NFL
20 Network, including NFL Europa, some college
21 games, some high school games, some pre-season
22 games, even then it is still less than one

1 percent of all of the programming minutes on
2 the network.

3 Q And how were you able to determine
4 those percentages -- 15 one-hundredths of a
5 percentage -- for the live regular season
6 games and less than one percent for all live
7 games programming?

8 A I queried the Tribune Media
9 Services database, which is a -- they maintain
10 program guide listings, electronic listings,
11 of all of the programming on the NFL Network,
12 as well as for many other networks. And I
13 looked -- one of the categories or descriptors
14 in that database is live game content. So
15 that is the resource I used for making that
16 quantitative calculation.

17 Q You also mentioned that the NFL
18 Network doesn't target an underserved
19 demographic. What does that mean?

20 A The NFL Network targets males 18
21 to 49. That demographic can be reached and
22 served. As a matter of fact, it is served by

1 a couple dozen other cable networks. And, you
2 know, cable operators are in the business of
3 serving underserved niches, underserved
4 demographics, underserved program areas. This
5 demographic is amply -- already amply covered
6 by a dozen or more other choices.

7 Q I would like to take a step back
8 and just -- could you explain what you mean by
9 the term "demographic"?

10 A Populations or viewer populations
11 can be broken down by -- the catch-all term is
12 "demographic." The first is gender, male or
13 female; second is age, usually under 17,
14 sometimes it is looked at as -- the next
15 demographic being 18 to 35, in this case 18 to
16 49, 49 to 54, 55-plus, sometimes 70-plus. So
17 that is the age demographic.

18 JUDGE SIPPEL: I hate to tell you
19 where I am. I mean, that is why I never get
20 any phone calls I guess from --

21 (Laughter.)

22 THE WITNESS: Unfortunately, last

1 year I moved out of one of the demographics as
2 well, so --

3 JUDGE SIPPEL: Go ahead. Thank
4 you, sir.

5 THE WITNESS: Another is income.
6 Another standard one is income. There is also
7 education, and you can look at race, and
8 sometimes there is language as well.

9 BY MR. TOSCANO:

10 Q And you mentioned that cable
11 companies target underserved demographics.
12 Why is that?

13 A Well, just, you know, going after
14 the same demographic doesn't necessarily get
15 you new customers. They are in the business
16 of acquiring and retaining customers. So
17 finding program material or finding -- finding
18 underserved groups of customers is the best
19 way of growing the subscriber base and
20 retaining the subscriber base.

21 Q Finally, in talking about the
22 factors that led you to conclude that the NFL

1 Network's price is excessive, you mentioned
2 its limited seasonal appeal. What were you
3 referring to there?

4 A These eight games were
5 concentrated over four to six weeks in the
6 fall, simply not enough time to be of
7 sufficient promotional value to market
8 themselves or even serve as a retention tool.

9 Q I would like to switch topics and
10 now talk about Nielsen ratings. And you are
11 aware that Dr. Singer, the NFL's expert, has
12 relied on Nielsen ratings?

13 A I am.

14 Q And could you tell us what Nielsen
15 ratings represent?

16 A At the core, a rating is actually
17 a percentage. And what a rating does is
18 measure the percentage of TV households
19 watching either a program or a network within
20 a network's TV household universe.

21 Q What do you mean a TV's household
22 universe?

1 A Well, every network has -- aside
2 from the broadcast networks, which reach
3 pretty much 100 percent of all of the
4 households, every cable network has a
5 different sized universe of TV households that
6 they reach.

7 Q So for a cable network a
8 particular rating is a percentage only of that
9 universe for that cable network?

10 A That is correct.

11 Q And so does a given rating, say a
12 five rating, represent the same number of
13 viewing households on the NFL Network and on
14 Versus, for example?

15 A No. The two networks have a
16 different sized universe. So that five
17 percent, or five rating, would translate into
18 a very different number for both -- for NFL
19 against -- and Versus on the other hand. The
20 numbers would not be the same.

21 Q And to be clear, does a five
22 rating, or any given rating, on the NFL

1 Network represent more or less viewers than
2 the same rating on Versus?

3 A It would be -- it would be less,
4 because the NFL Network has a smaller
5 universe.

6 Q Mr. Gerbrant, are you aware of any
7 connection between ratings and license fees of
8 a cable network?

9 A I actually undertook a study of
10 that and found there was no pattern and no
11 connection, no consistent connection, between
12 the two.

13 Q Could you describe the study that
14 you undertook?

15 A Yes. I actually took a look at
16 over 70 cable networks and looked at their
17 Nielsen 24-hour rating and looked at their
18 average license fee per subscriber, and looked
19 to see if there was any kind of pattern.

20 If the -- did the higher-rated
21 networks consistently have higher license
22 fees? Or did the lower-rated networks

1 consistently have lower license fees? And
2 there simply was no pattern. That is -- the
3 higher-rated networks did not have higher
4 license fees, and lower-rated networks didn't
5 have lower -- consistently lower license fees.
6 It was all over the board.

7 Q Did that surprise you?

8 A No, it didn't actually. I mean,
9 not after covering the industry for 25 years,
10 no.

11 Q Do you believe that ratings are a
12 factor in a distributor's evaluation of a
13 cable network?

14 A I think components of ratings are
15 important. And I think we have already
16 discussed one -- demographics -- which is a
17 rating component. Also, the way a rating
18 translates into viewing patterns -- do you
19 have a small number of people watching
20 television a lot, do you have a lot of people
21 who are watching a little bit, or is the
22 viewing pattern in a particular day part --

1 part of the day, or is it primarily weekend --
2 all of those things you can see with ratings
3 data. So it is the components and the pattern
4 that is important, but not the rating itself.
5 Otherwise, it would have shown up in the
6 analysis I did.

7 Q So did you take ratings into
8 account when you reached the conclusion that
9 the NFL Network's price is excessive?

10 A No, because that is not a way --
11 doesn't appear -- the rating alone doesn't
12 appear to have a connection with a cable
13 network's license fee.

14 MR. TOSCANO: Thank you. No
15 further questions at this time.

16 JUDGE SIPPEL: Well, you said the
17 rating alone isn't. What would you -- what
18 would be the considerations for the licensing
19 fee? Can you testify to that? Do you know
20 about that?

21 THE WITNESS: Actually, I didn't
22 undertake a study of what the license fee